Honorable Palmer Robinson
Noted: Friday, Jan. 14, 2005
10:30 a.m.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

1000 FRIENDS OF WASHINGTON, KING COUNTY, and CENTER FOR ENVIRONMENTAL LAW AND POLICY Plaintiffs, vs. RODNEY McFARLAND, Defendant.	No. 04-2-37112-1 SEA PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION & RELIEF REQUESTED

The state Growth Management Act ["GMA"] requires King County to adopt regulations to protect environmentally significant areas, which are referred to in the GMA as critical areas. King County conducted a multi-year process to comply with the numerous planning and regulatory requirements of state law, and, on November 5, 2004, enacted three related ordinances [referred to collectively as the "Critical Areas Ordinances" or the "CAO"]. Defendant Rodney McFarland is the sponsor of referenda to reject each of these ordinances. Both state statutes and caselaw, however, preclude subjecting these ordinances to referendum. Accordingly, King

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County requests that this court enter a declaratory judgment that the three ordinances comprising the CAO are not subject to referendum and that the county is not required to place the CAO referenda on the ballot or to take any other related actions.

As will be discussed below, time is of the essence in this matter. King County respectfully requests that this court rule on the day of argument in this matter. A proposed order is submitted with this motion.

II. STATEMENT OF FACTS

This matter presents a pure legal issue. Accordingly, rather than a typical statement of facts, the context for the legal issues presented in this case is better provided by a review of the procedural history of King County's efforts to satisfy the requirements of state law through its enactment of the CAO.

A. The GMA requires counties and other local governments to enact regulations to protect environmentally significant areas.

Washington adopted the GMA in 1990. *See* 1990 WASH. LAWS, 1st Ex. Sess., ch. 17. One of the significant motivations behind the adoption of the GMA was the need to protect environmentally significant areas. *See, e.g.*, RCW 36.70A.020(10) (establishing environmental protection as one of the GMA planning goals); RCW 36.70A.060(2) (requiring counties and cities to adopt development regulations protecting critical areas[1] even if those jurisdictions are not otherwise subject to the GMA). Environmentally significant areas required to be protected under the GMA include wetlands, areas with a critical recharging effect on aquifers, and fish and wildlife habitat conservation areas. *See* RCW 36.70A.030(5). As evidence of the primary

[1] The term "critical areas" is defined broadly under the GMA to include a variety of environmentally significant areas. The GMA provides that "'[c]ritical areas' include the following areas and ecosystems: (a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas." RCW 36.70A.030(5).

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importance assigned by the legislature to the talk of protecting critical areas, the first requirements the GMA imposed on local governments involved the preliminary designation of environmentally significant areas and the adoption of regulations to protect and conserve those lands. *See* RCW 36.70A.060(2), .060(3), .170; WAC 365-190-040.

As originally adopted, the GMA allowed local governments significant discretion to determine exactly what regulations were necessary to protect environmentally significant areas. The GMA contained largely procedural requirements. As noted above, the first action the GMA required local governments to take was to preliminarily designate environmentally significant areas and to adopt regulations to protect and conserve those lands. Subsequent GMA requirements generally applied only to counties of a certain size and to cities within those counties. *See* RCW 36.70A.040(1). After adopting measures to protect environmentally significant areas, the GMA next required counties and cities to adopt countywide planning policies to ensure coordinated planning between counties and cities. RCW 36.70A.040(3)(a), .210. Next, the GMA required counties and cities to adopt comprehensive plans. RCW 36.70A.040(3)(d), .070. Finally the GMA required jurisdictions to adopt land use development regulations that are consistent with and implement their comprehensive plans. RCW 36.70A.040(3)(d). These requirements were largely procedural; the GMA allowed local governments significant discretion to determine exactly what regulations were necessary to implement the requirements of the GMA, including the protection of environmentally significant areas.

In 1995, the legislature amended the GMA to proscribe much more strictly what regulations were required for local governments to satisfy GMA environmental protection requirements. The legislature added a requirement that critical areas must be protected by local

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policies and regulations that are based on "best available science." RCW 36.70A.172(1). The state developed a detailed process through which local governments must develop policies and regulations based on "best available science." *See* WAC 365-195-900 to -925. In legal challenges, local government's compliance with these requirements is rigorously scrutinized. *See* Alan D. Copsey, *Including Best Available Science in the Designation and Protection of Critical Areas Under the Growth Management Act*, 23 SEATTLE U. L. REV. 97, 116 & n.53 (1999) (discussing various cases holding that local governments must sufficiently document their compliance with the GMA's best available science requirement). King County was required to complete that process by December 1, 2004. *See* RCW 36.70A.130(4)(a) (requiring King County to review and revise its comprehensive plan and development regulations to ensure they are compliant with all provisions of the GMA, which includes the best available science requirement, by December 1, 2004[2]).

B. King County engaged in extensive efforts to develop land use development regulations in compliance with the GMA requirements regarding the protection of environmentally significant areas.

King County engaged in an extensive internal and public process to update its land use development regulations to ensure they satisfy the GMA requirement of being based on best available science. *See* Declaration of Harry Reinert ¶¶ 8-15. Ultimately, King County developed and adopted three interrelated ordinances, which comprise the CAO. *See* King County Ordinance Nos. 15051, 15052, 15053. Each of these three ordinances constitutes a development regulation under the GMA. *See* RCW 36.70A.030(7); *Yes for Seattle*, 122 Wn. App. at 390, 93

[2] The requirement that local governments periodically review and update their land use development regulations to ensure continuing compliance with the GMA was originally adopted in 1997. *See* LAWS OF 1997, ch. 429, § 10. As originally adopted, the deadline for King County to ensure on-going compliance with the GMA was December 1, 2002. *Id*. The GMA was subsequently amended to extend this deadline to December 1, 2004. LAWS OF 2002, ch. 320, § 1.

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P.3d at 180 (holding that the term "development regulation" should be broadly applied); Reinert Decl. ¶ 9. More significantly, however, the ordinances function collectively to protect environmentally significant areas in unincorporated King County. *See* King County Ordinance 15051 pmbl. ¶¶ 3(c) - 3(f). The King County Council passed these three ordinances on October 25, 2004, and the King County Executive signed them into law on November 5, 2004. *See* King County Ordinance Nos. 15051, 15052, 15053.

C. Defendant is attempting to subject the CAO to referendum.

On November 5, 2004, Defendant Rodney McFarland filed with the Clerk of the King County Council proposed petitions for referendum of the three ordinances that comprise the CAO. *See* Complaint Exs. A - C. The proposed petitions listed Mr. McFarland as the CAO referenda's sponsor. *Id.* The Clerk of the King County Council assigned numbers 22, 23, and 24 to the proposed referenda and on November 5, 2004, transmitted the CAO referenda to the King County Prosecuting Attorney.[3] *See* Complaint Ex. D. As required by law, the Prosecuting Attorney prepared a ballot title for each of the CAO referenda and transmitted the ballot titles to the Clerk of the Council on November 10, 2004. *See* Complaint Ex. E. The Clerk of the Council sent Mr. McFarland a letter dated November 12, 2004, and enclosed the ballot titles as prepared by the Prosecuting Attorney. *See* Complaint Ex. G. By letter dated November 15, 2004, the Clerk of the Council officially informed Mr. McFarland that his petitions for referendum were approved as to form. *See* Complaint Exs. H - I. The deadline for filing signed petitions is December 30, 2004. *See* Ex. I. If on that date, Mr. McFarland submits sufficient valid

[3] The county's actions involving receiving the referendum petitions, approving their form, and preparing a ballot title are ministerial acts and do not address the legality of the proposed referenda. *See Philadelphia II*, 128 Wn.2d at 712-15, 911 P.2d at 392-93 (holding that acts related to preparing an initiative or referendum for the ballot are ministerial).

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signatures, the CAO referenda would be subject to a public vote of the electorate in unincorporated King County in March. *See* King County Charter § 230.40; King County Code ch. 1.16.

III. STATEMENT OF ISSUE

Whether county land use development regulations may be subject to local referendum when the state legislature has required that such regulations be adopted by the county legislative authority.

IV. EVIDENCE RELIED UPON

Evidence relied upon in support of this motion for summary judgment is set forth in the Declaration of Sean Bouffiou and the Declaration of Harry Reinert and the records and files herein.

V. AUTHORITY

A. Referendum of King County ordinances is subject to the limitations of state law.

The availability of referenda and initiatives in King County originates in the Washington Constitution. *See* WASH. CONST. art. XI, § 4. The Washington Constitution provides that "[a]ny county may frame a "Home Rule" charter for its own government subject to the Constitution and laws of this state . . . ." *Id.* The limitation "subject to the . . . laws of this state" allows the state legislature to limit the provisions of home rule charters. *Henry v. Thorne*, 92 Wn.2d 878, 881, 602 P.2d 354, 355 (1979).

As authorized by state law, King County has adopted a home rule charter. *See* King County Charter. Through its charter, King County authorizes referenda and initiatives. *See* King County Charter § 230.40. Some county ordinances are applicable throughout the county, including both incorporated and unincorporated areas, and referenda would occur on a

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countywide basis. However, the Charter contains a special provision, however, for ordinances that are effective only in unincorporated portions of the county. The Charter provides, in pertinent part, as follows:

> [A]n enacted ordinance which pursuant to state law is effective only in unincorporated areas of the county may be subjected to a referendum by the voters of the unincorporated areas of the county by filing with the county council prior to the effective date of the ordinance petitions bearing signatures of registered voters residing in unincorporated areas of the county equal in number to not less than eight percent of the votes cast at the last preceding election for county executive . . . . [I]n the case of an ordinance effective only in unincorporated areas of the county, the proposed ordinance shall be voted upon only by the registered voters residing in unincorporated areas of the county.

Id. County referenda are also subject to the state constitutional limitation that they be consistent with state law.

B. Given existing caselaw, there is no question that the GMA prohibits subjecting the county's critical areas ordinances to referendum.

Resolution of this case should be simple. The Washington Supreme Court has clearly established that the state Growth Management Act precludes subjecting local land use regulations to referendum. *Brisbane v. Whatcom County*, 125 Wn.2d 345, 355, 884 P.2d 1326, 1332 (1994); *Snohomish County v. Anderson*, 124 Wn.2d 834, 845, 881 P.2d 240, 246-47 (1994) [hereinafter *Anderson II*]; *Snohomish County v. Anderson*, 123 Wn.2d 151, 156-59, 868 P.2d 116, 118-120 (1994) [hereinafter *Anderson I*]; *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 392-93, 93 P.3d 176, 181 (2004), *petition for rev. filed*, (Wash. July 23, 2004) (No. 75796-8).

Brisbane presented facts almost identical to those in the instant matter. Whatcom County had adopted critical areas regulations pursuant to the GMA. *Brisbane*, 125 Wn.2d at 346, 884

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P.2d at 1327. Brisbane conducted a referendum campaign and collected a sufficient number of signatures to require placement of the referendum on the ballot. *Id.* at 347, 884 P.2d at 1327. Whatcom County sought a declaratory judgment that the GMA precluded a local referendum on critical areas regulations. *Id.* at 347, 884 P.2d at 1327. The Washington Supreme Court concluded:

> The Whatcom County Home Rule Charter may grant the people the right of referendum over ordinances enacted by the County. However, allowing exercise of that right over ordinances enacted pursuant to the Growth Management Act would run counter to and frustrate the declared purposes of the Act to prevent uncoordinated and unplanned growth and to encourage conservation and wise use of land.

Id. at 355, 884 P.2d at 1332. Accordingly, the court held that the GMA precludes subjecting local land use regulations to referendum. *Id.* at 355, 884 P.2d at 1332.

Brisbane followed established Washington Supreme Court precedent that local land use regulations are not subject to referendum. *See Anderson II*, 124 Wn.2d at 845, 881 P.2d at 246-47; *Anderson I*, 123 Wn.2d at 156-59, 868 P.2d at 118-20. Moreover, the court of appeals very recently reaffirmed the rule that land use regulations are not subject to referendum. *See Yes for Seattle*, 122 Wn. App. at 392-93, 93 P.3d at 181.

This well-established caselaw should make resolution of this matter simple. The GMA precludes subjecting the King County CAO to referendum.

C. The existing cases are correct.

Even if this court were not bound by the holdings in *Anderson*, *Brisbane*, and *Yes for Seattle*, the result in the instant case should still be the same. The appellate courts correctly decided those cases, and accordingly considering the issue anew would lead to the same result. The GMA precludes subjecting local land use regulations to referendum.

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A cardinal principle of Washington's referendum law is that local referenda are prohibited if they involve powers granted by the legislature to local legislative bodies, rather than to the municipality itself. *State ex rel. Guthrie v. City of Richland*, 80 Wn.2d 382, 384, 494 P.2d 990, 991 (1972) (holding that "[i]t is settled that any [local] charter provision which has the effect of limiting or restricting a legislative grant of power to the legislative authority or other officer of a city is invalid" and rejecting attempt to submit local ordinance to referendum).

There should be no question that the CAO was adopted pursuant to state legislation requiring action by the local legislative authority. *Brisbane*, 125 Wn.2d at 349-50, 884 P.2d at 1329;[4] *see also* 36.70A.060(2) (requiring local jurisdictions to adopt regulations that protect critical areas), .172(1) (requiring that such regulations be based on best available science), .130(4)(a) (requiring that such regulations be adopted by December 1, 2004). The GMA delegates responsibility for adopting land use development regulations to the local legislative authorities, thereby precluding local referenda of such regulations. *Brisbane*, 125 Wn.2d at 349-50, 884 P.2d at 1329. Beyond the GMA, the authority to enact zoning and other environmental regulations is delegated to local legislative authorities. *See* RCW 36.32.120(7).

Even if the county's CAO was not *required* by the GMA, state law would still preclude a referendum. *See Yes for Seattle*, 122 Wn. App. at 389, 93 P.3d at 179. In *Yes for Seattle*, the initiative proponent contended that a ballot measure was not precluded because the subject regulations were not *required* by the GMA. *Id.* The court of appeals rejected this argument and

[4] The GMA has been repeatedly amended since the Washington Supreme Court issued the *Brisbane* decision in 1994. KEITH W. DEARBORN & JOHN M. NETTLETON, 6 WASHINGTON REAL PROPERTY DESKBOOK § 95.2 (Edward W. Kuhrau et al. eds., 3d ed. 1996 & Supp. 2001). In none of these amendments has the legislature ever altered the holding of *Brisbane*. Legislative silence regarding a construed portion of a statute in a subsequent amendment creates a presumption of acquiescence in that construction. *Baker v. Leonard*, 120 Wn.2d 528, 545-46, 843 P.2d 1050, 1054 (1993).

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held that a ballot measure was precluded even if the subject regulations were not required by the GMA. *Id.*

Subjecting land use development regulations to referendum would also be inconsistent with the public policy of broad concern embodied in the GMA. The state law prohibition on subjecting local land use development regulations to referendum is necessary given the detailed requirements of the GMA. Referenda, as well as initiatives, simply could not satisfy many GMA provisions. For example, the GMA requires local land use development regulations to be developed through an extensive program of public participation. RCW 36.70A.140. Moreover, local governments are subject to even more detailed requirements with regard to ensuring that regulations are based on best available science. *See* WAC 365-195-900 to -925. Simply put, the requirements of the GMA cannot be accomplished by a simple "yes or no" vote at the ballot box. *See Anderson*, 123 Wn.2d at 156, 868 P.2d at 118.

In addition to the universal problems with subjecting land use development regulations to referenda and initiatives, the particular referendum at issue in this case illustrates an additional problem. Pursuant to the King County Charter, Mr. McFarland has proposed three referenda that would only be voted on by the electorate in the unincorporated portions of King County. King County Charter § 230.40. This attempt to decide this issue in an election, particularly one to be held only in one portion of the county, is contrary to the GMA requirement for balance and coordination in land use decision making. *See* RCW 36.70A.010. RCW 36.70A.010 is the codification of legislative findings regarding the basis for the GMA. The legislature found "that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and the wise use of our lands, pose a threat to . . ." public

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health and welfare. *Id.* The legislature also found that "[i]t is in the public interest . . . [to] cooperate and coordinate with one another in comprehensive land use planning." *Id.*

All areas experience a mix of burdens and benefits from land use regulations. The GMA would not work if specific areas were able selectively to opt out of specific regulations. For example, the electorate of the City of SeaTac cannot adopt an ordinance that prohibits the siting of an airport, and the City of Seattle cannot adopt an ordinance precluding urban development. In both cases, the jurisdiction has to accept some burden (airport noise or congestion and other problems associated with density) for the overall public good. The comprehensive system of land use planning required by the GMA requires that interests be balanced throughout the county, and it precludes such narrow local decisions since they would frustrate comprehensive and balanced land use plans mandated by the state legislature. This sort of land use planning simply cannot be accomplished by initiative and referendum.

D. The CAO Referenda should be reviewed prior to any election

Pre-election review is appropriate to determine whether a referendum is precluded by state law. For nearly ninety years, Washington courts have granted pre-election review to determine whether proposed referenda and initiatives are within the scope of the referendum and initiative power.

> Generally, courts are reluctant to rule on the validity of an initiative before its adoption by the people. . . . However, an established exception to this rule in Washington is that a court will review a proposed initiative to determine if it is beyond the scope of the initiative power.

Philadelphia II v. Gregoire, 128 Wn.2d 707, 716-17, 922 P.2d 389, 393-94, *cert. denied*, 519 U.S. 862 (1996); *Yes for Seattle*, 122 Wn. App. at 386, 93 P.3d at 178. The court had granted

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pre-election review in *Anderson*, *Brisbane* and *Yes for Seattle*, and it should do the same in this case.

In *Philadelphia II*, the court explained the long-standing rule that referenda and initiatives were properly reviewed pre-election to determine whether they were within the scope of the referendum and initiative powers. The court observed that "[t]he idea that courts can review proposed initiatives to determine whether they are authorized by article II, section 1, of the state constitution is nearly as old as the amendment itself." *Id*. at 717, 922 P.2d at 394. *Philadelphia II* relied on *State ex rel. Berry v. Superior Court*, 92 Wn. 16, 34-35, 159 P. 92, 97 (1916) (enjoining the printing and distribution of proposed initiative measure due to the preamble being improper argument and not legislative in character). *Philadelphia II* also relied on *Leonard v. City of Bothell*, 87 Wn.2d 847, 853, 557 P.2d 1306, 1310 (1976), as an example of this "established exception." In *Leonard*, the court granted pre-election review, holding that a referendum seeking to repeal a rezone was invalid, because the "legislature granted the power here exercised to the legislative body of respondent . . . ." 87 Wn.2d at 853, 557 P.2d at 1310. The initiative proponents in *Philadelphia II* urged the court to overrule decades of precedent and "hold that no pre-election review is proper, provided that procedural requirements have been met and there is no indication of fraud." *Philadelphia II*, 128 Wn.2d at 718, 911 P.2d at 394 (emphasis omitted). The court declined to do so and held:

> [T]he rationale . . . in distinguishing review of the constitutional validity of a proposed measure and whether the measure is authorized by our state constitution is sound and finds support among commentators and other jurisdictions. The distinction . . . allows a sensible balance between allowing a court to prevent public expense on measures that are not authorized by the constitution while still protecting the initiative power from review of an initiative's provisions for possible constitutional infirmities.

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Id. (citation omitted).

As the court stated, in cases such as this where the threshold question is whether the measure is within the scope of the referendum or initiative power, pre-election review is appropriate because it allows the court to prevent a wasteful expenditure of public funds on a measure that is precluded by state law. This purpose behind pre-election review is clearly furthered in this case where the unnecessary expenditure of public funds related to the election would be significant. The costs for elections are shared among the jurisdictions that place measures on the ballot. *See* Declaration of Sean Bouffiou ¶ 2 ["Bouffiou Decl."]. Election costs are allocated among the participating jurisdictions based on the number of active registered voters in each of the jurisdictions. Bouffiou Decl. ¶ 2. Currently, the CAO referenda are the only measures that would be scheduled for the March 2005 Special Election ballot. Bouffiou Decl. ¶ 3. If no other jurisdictions come forward with a measure for that election, King County, and ultimately its taxpayers, would bear 100% of the costs associated with the March Special Election. Even if any measures were to be added to the March ballot, it is unlikely to reduce King County's costs significantly. This is because a vast majority of other jurisdictions in King County, such as fire districts and school districts, has a much smaller number of active registered voters and encompass a far smaller geographic area. Their share of the total election costs would therefore be a small percentage of the overall costs, and King County would be left with the remainder. Bouffiou Decl. ¶ 5. The CAO referenda would still require a substantial public expenditure. Bouffiou Decl. at ¶¶ 4-5. Based on the cost of previous special elections and the current number of active registered voters in unincorporated King County, the Elections Division estimates the cost of a March 2005 Special Election covering all of unincorporated King County would be approximately $435,000. Bouffiou Decl. at ¶ 4. Additionally, if a voters' pamphlet is

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authorized, the cost to King County would increase by approximately $34,720. *Id.* This is a significant cost for an election on measures that are not authorized by law because they are beyond the scope of the referendum power. As a result, this case provides clear support for the Washington Supreme Court's stated purpose for the exception to the general rule against pre-election review.

Immediate review is also appropriate because the referendum process will render the county out of compliance with the GMA. King County timely enacted critical areas regulations. The referendum process will effectively stay those regulations, thereby rendering the county in violation of the GMA requirement to have updated its critical areas regulations based on best available science. If the county is found to be out of compliance with the GMA, the county would be ineligible for certain grants and other financial assistance from the State. *See* RCW 36.70A.130(7). Additionally, if the county's land use regulations are found to be invalid, development permit applications would also not be able to vest, effectively creating a moratorium on development. *See* RCW 36.70A.302. Ultimately, the governor could impose sanctions against the county. RCW 36.70A.330(3), .345. Sanctions that can be imposed include withholding various tax revenues from the county. RCW 36.70A.340.

In addition to the significant cost issues, this court should still review the proposed measures pre-election to preserve the right of the voters not to be called to cast a ballot on an unlawful measure.[5] King County has followed the court's direction in *Philadelphia II* by performing the ministerial duty of preparing the ballot titles and then bringing an action in court

[5] The court conducted pre-election review in *Anderson*, *Brisbane* and *Yes for Seattle* despite no finding of any particular cost to the local jurisdiction. With respect to *Yes for Seattle*, the City of Seattle already had two other measures on the 2003 September Primary / Special Election ballot. Accordingly, the cost to the City and the other participating jurisdictions of a third City measure would have been negligible. Bouffiou Decl. ¶ 6.

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to prevent the measures from being placed on the ballot. The voters in King County should not be asked to consider and cast votes for measures that are unauthorized by law. The court should enforce the idea that voting is an important right that all citizens should conscientiously exercise. Asking them to cast votes for measures that, based on clear authority, are beyond the scope of the referendum power and that a court would ultimately find to be invalid, would frustrate and confuse voters and would lessen the importance of their right to vote. This court should follow *Philadelphia II, Anderson, Brisbane* and *Yes for Seattle*, as well as numerous other cases, and immediately declare the CAO referenda invalid. The voters of King County have a right to vote only on measures that are authorized by law and not be forced to waste both their time and significant public funds on an election that will have no effect. Pre-election review is necessary in this case.

Finally, expeditious review of this matter is necessary to avoid regulatory confusion about what regulations apply in unincorporated King County. By its express terms, the CAO is effective January 1, 2005. The King County Charter provides that the effective date of an ordinance is stayed if it subjected to referendum *See* King County Charter § 230.70. However, this provision is conditioned on the submission of a sufficient number of signatures *and* the ordinance actually being subject to a referendum. *See id.* As discussed above, Washington law precludes subjecting the CAO to referendum. People wishing to develop their property may experience regulatory confusion or uncertainty during any period between January 1, 2005 and the Court's ruling in this matter. An expedited judicial determination is necessary to minimize this problem.

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VI. CONCLUSION

The law is clear: state statutes and caselaw preclude subjecting local land use development regulations to referendum. In *Anderson, Brisbane* and *Yes for Seattle*, the court recognized that when the state legislature enacted the GMA, it delegated authority to regulate land use and development exclusively to local legislative authorities and thereby precluded local governments from submitting such measures to referendum or initiative. Accordingly, King County requests that this court enter a declaratory judgment that the CAO is not subject to referendum and that the county is not required to place the three CAO referenda on the ballot or to take any other related actions.

DATED this _____ day of December, 2004.

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